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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 607

THE DAILY PRESS, INC.,
Petitioner,
vs.
UNITED PRESS INTERNATIONAL,
THE EVENING NEWS ASSOCIATION
and
KNIGHT NEWSPAPERS, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN OPPOSITION FOR RESPONDENT THE EVENING NEWS ASSOCIATION

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This brief in opposition is filed on behalf of respondent The Evening News Association.

The decision below does not merit certiorari. No novel or important questions of legal principle are involved. The issue is narrow and the relevant factual situation is unique and peculiar to petitioner. There is no conflict with any decision of this Court or the decisions of other circuits. Both procedurally and substantively the Courts below were clearly correct in their disposition of the case.

QUESTIONS PRESENTED

In a civil antitrust action alleging violations of Sections 1 and 2 of the Sherman Act (herein the Act) based upon the failure of an interim newspaper, intended to be and published only during a strike against the major Detroit newspapers, to purchase wire services from UPI, did the Court of Appeals correctly affirm the District Court with respect to respondent The Evening News Association when the District Court:

(a) found that after extensive discovery plaintiff failed to show the existence of any tangible evidence to support the alleged violations;

(b) found that there was no genuine issue as to material facts;

(c) found that undisputed facts refuted the plaintiff's charges;

(d) granted summary judgment in favor of The Evening News Association?

STATEMENT

Petitioner's statement is incomplete and misleading (Pet. Cert. 4-11). Reference is respectfully made to the opinion of the District Court wherein extensive findings of fact are set forth (Pet. Cert. 23-30) and to the opinion of the Court of Appeals wherein the facts are discussed at length (Pet. Cert. 47-65). Herein the statement is limited to pertinent facts relating particularly to respondent The Evening News Association.

The Daily Press was an interim newspaper intended to be and was published only during a period when publication of both the News[1] and Free Press[2] was suspended due to the strike (91a, 93a-94a, 193a, 308a).[3] The editorial and advertising staffs of Daily Press were largely made up of employees of the Free Press who were temporarily out of work due to the strike. Circulation of the Daily Press was handled by News circulation department employees likewise temporarily out of work for the same reason (124a, 270a-271a).

Before commencing publication Michael Dworkin, president, editor and publisher of the Daily Press, contacted UPI and (197a-198a) was erroneously informed that to get wire service under a contract different from that of the News and Free Press it would be necessary to obtain their approval (197a-199a). Thereafter Frank Gill, the Daily Press executive editor, contacted News and Free Press officials that he knew personally.

When contacted by Gill the News' managing editor, Harvey Patton, conferred with Martin Hayden, the News' editor. Patton called Gill back and told him "We have no objection. We see no reason to object. But we don't want to be mixed up at all. We want nothing to do with it" (306a). Dworkin quoted Patton as saying "so far as the News is concerned this is a matter which concerns only you and United Press International. We want to have nothing to do with it. We don't want to be connected with you or

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[1] The Detroit News is owned and published by respondent The Evening News Association, herein called the "News".

[2] The Detroit Free Press is owned and published by respondent, Knight Newspapers, Inc., herein called the "Free Press".

[3] References to "(—a)" are to pages in the Joint Appendix in the Court of Appeals.

your negotiations with United Press in any way whatsoever. If they want to sell you the service that is their business. We want no part of it" (62a).

Peter B. Clark, president of The Evening News Association and publisher of the News, had no communication with any of the officers or executives of the Free Press concerning any attempt of Daily Press to obtain UPI wire service, had no communication with anyone at UPI relating to the Daily Press, had only been casually informed of Daily Press' interest in UPI service by Martin Hayden and they both regarded it as irrelevant since there was nothing they could do about it and wasn't a matter of their concern (104a-105a, 127a, 128a-130a).

The News does not have and has not had any agreement or understanding with or acted in concert with either UPI or the Free Press, individually or jointly, to the effect that UPI will not sell, lease or otherwise make available all of its wire service to Daily Press or any other daily newspaper in the Detroit area (145a-147a).

The News is and has been a subscriber to certain wire services of UPI at least since 1934 (145a). This is the only relevant or material relationship between the News and the other defendants. The written contract between the News and UPI provides in part:

> "FIFTH. It is mutually agreed that United Press reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news Report to any other party or parties" (145a, 1b).

None of the principals connected with Daily Press including the publisher, Dworkin, executive editor, Gill, city editor, Hazeltine and others, had any knowledge, directly

or indirectly, of any facts to indicate that the News or Free Press or anyone connected with them interfered with or attempted in any way to prevent Daily Press from obtaining wire service from UPI (65a-70a, 73a-75a, 78a-79a, 81a-82a, 85a-87a, 94a-95a, 98a).

The District Court filed its opinion and granted summary judgment in favor of the defendants. The Court held there was no genuine issue as to any material facts and found some of the relevant undisputed facts to be as follows:

> "Plaintiff readily admits that there is no evidence of any formal arrangement or agreement among these defendants to deprive plaintiff of wire service" (177a).
>
> * * * * *
>
> "Representatives of both the News and the Free Press told plaintiff that their papers had no objections, to a contract between UPI and plaintiff, felt it was no concern of theirs and did not want to get mixed up in it. They felt was a matter between UPI and the Daily Press.
>
> "Depositions from both plaintiff and defendants agree on this point" (179a).
>
> * * * * *
>
> "In fact none of the plaintiffs deponents knew of any activities on the part of any of the defendants herein which were directed toward the prevention of their obtaining wire service" (179a).
>
> * * * * *
>
> "Both the News and the Free Press told Mr. Dworkin that they wanted no part in whether or not UPI sold them service. (Dworkin Dep. 86-87) He was also told by Mr. Johns of UPI that their negotiations had nothing to do with defendant papers and that whether they agreed or disagreed was immaterial and that all that was necessary for them

to get a contract would be to conform to stated contract terms." (Dworkin Dep. 88) "which Mr. Drowkin felt were too extravagant" (181a).

* * * * *

"We find no evidence of any kind to support the existence of such a conspiracy, concert of action, contract or agreement, express or implied" (184a).

* * * * *

"Plaintiff cannot—brush off the undisputed fact that it did not enter the publishing business to be a competitor to any existing paper but merely intended to fill the void created by the strike and furnish a service to the readers of the metropolitan Detroit area" (191a).

* * * * *

"Defendants were not publishing, they were closed down. They could not and did not compete with plaintiff. Plaintiff at no time, according to the record, purported to be anything but an interim newspaper and at no time did plaintiff assert that it meant to continue in business as a competitor to the other two daily papers" (191a).

* * * * *

"Plaintiff cannot now claim to be a competitor in the face of this record merely to support its otherwise unfounded allegations that the defendants acted in concert out of reasons based upon business competition. There was no competition. Plaintiff did not intend to publish after the strike and the defendants knew that it did not. We cannot now pretend that the facts were otherwise" (191a-192a).

* * * * *

"Defendants are not competitors of plaintiff nor have they been shown to have entered or contemplated an unlawful agreement or action directed toward an unlawful purpose, i.e. monopolization" (194a).

Prior to the filing of the Motions for Summary Judgment all persons who appeared to have or should have had any knowledge of any facts relevant to the allegations in the complaint were deposed. Such persons included Alan Mims Thomason, President and General Manager of UPI; Dale M. Johns, Central Division Manager of UPI; Lee Hills, Executive Editor and Publisher of the Detroit Free Press and Vice President and Director of Knight Newspapers; Peter B. Clark, President of The Evening News Association and Publisher of the Detroit News and Harvey W. Patton, former Managing Editor of the Detroit News.

Also included were all the principals connected with the petitioner: Michael Gordon Dworkin, President, Editor and Publisher; Irving G. Hershman, Director and Financial Advisor; Richard A. Siegel, Secretary, Director and General Manager; Mark Stern, Vice President and Director; Gary Stern, Chairman of the Board of Directors; Frank P. Gill, Executive Editor; Curtis C. Hazeltine, City Editor.

The transcripts of depositions contained over a thousand pages of testimony. In addition to the testimony, voluminous documents were demanded and examined by the petitioner. The discovery proceedings were so extensive and the depositions so copious as to put an extraordinary burden on the Court to extract the pertinent portions. In order to lighten this burden the parties adopted the procedure of filing affidavits citing pertinent extracts from the depositions (56a-137a; 195a-407a). The Court held two pretrial conferences and a hearing on objections to interrogatories prior to ruling on the motions for summary judgment (2a-4a).

ARGUMENT

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The decision of the Court of Appeals does not involve any important question of federal law. Although Petitioner is obviously dissatisfied with the application of the law to the unique facts of this case, it is abundantly clear that nothing of new legal significance is involved. Petitioner simply failed to produce or show the existence of any evidence involving the News to support the allegations of the complaint. The substance of the decision of the Court of Appeals is that the District Court was correct in ruling that the *undisputed facts* developed by extensive discovery showed that Petitioner did not have a claim upon which relief could be granted.

II.

THERE IS NO GENUINE ISSUE OF FACT AND PARAGRAPH 2 OF THE PETITION SHOWS NONE

Petitioner's arguments directed toward UPI require no answer by this respondent. The only claim the Petition asserts against the News is contained in paragraph 2 and relies only on Section 1 of the Act (Pet. Cert. 16-17).

There is no question that UPI and the News had a long standing relationship . . . but only as supplier and customer. The claim that the News contract terms were far more generous than anything offered to Petitioner by UPI is contrary to the evidence and the findings of the trial court (Pet. Cert. 36-38). It is irrelevant in any event

absent some proof that the News had something to do with it. There is no evidence to support the statement "that the newspapers were aware of the fact that new entrants could not get such terms" and petitioner cites none. Moreover, the petitioner was an interim newspaper and not a "new entrant" if that means a newspaper that hopes or intends to be permanent.

The bald assertion that the entire history of the wire service industry is infected with trade restraints is not helped by reference to a case between different parties that arose out of facts existing more than twenty-five years ago. The only record reference cited by petitioner to support its claims in paragraph 2 contains nothing even remotely relevant thereto. The testimony cited refers to asset value type contracts no longer used by UPI and never entered into by the News or Free Press. Petitioner's contention that it was not permitted to show an unlawful relationship (presumably between the respondents) has no support in the record and no reference is cited. Petitioner was given every opportunity for discovery relating to the issues of liability and relative to the motion by this respondent for summary judgment. The only excluded evidence relating to this respondent was only relevant, if at all, to the issue of damages (42a, 152a). The evidence adduced conclusively disproved the plaintiff's allegations of violation of the Act on the part of The Evening News Association.

III.

THE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OF THE DECISIONS OF OTHER CIRCUITS

Petitioner's claims of conflicting law are unsubstantial. The decision of the Court of Appeals neither involved nor created any conflict as to applicable principles of law. The Court of Appeals affirmed the District Court which adopted and applied well defined principles of antitrust law to the particular facts of Petitioner's case.

Petitioner's assertion that the decision of the Court of Appeals is in conflict with *Albrecht, Fortner* and *Norfolk Monument* is incorrect.[4] In *Albrecht* there was no question but that the defendants acted in concert and committed overt acts directed against the plaintiff knowing that their purpose was illegal price fixing and would injure plaintiff. Here there were no overt acts by the News or Free Press or any facts from which it could be inferred that they were acting in combination with each other or with UPI or did anything to prevent petitioner from obtaining wire service from UPI. All the evidence was to the contrary.

Fortner was a "tie-in" case and has no application here. Petitioner's reference to "legitimate business purpose" is not in point on any charge against the News. In *Norfolk Monument* four defendant cemeteries adopted substantially identical regulations which prevented plaintiff from installing his products therein. Here there was no competition, no competitor and no parallel restrictive acts, in fact no restrictive acts at all. As the District Court found, the conduct of the parties and the undisputed facts affirmatively

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[4] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

refuted petitioner's charges. Not only did petitioner fail to show the existence of any evidence either disputed or undisputed that would warrant a trial, but moreover the undisputed facts adduced from the evidence of all the parties showed no such evidence existed. The findings and conclusions of the District Court were concurred in by the Court of Appeals.

IV.

THERE IS NO CONFLICT AS TO THE LAW OF SUMMARY JUDGMENT

The decisions of the District Court and the Court of Appeals followed the precepts of this Court with respect to the rule for summary judgment. Specifically recognizing the holding of this Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1968) that summary judgment should be used sparingly in complex antitrust litigation, the Court of Appeals found no complex issues in this case and correctly held that Rule 56 FRCP is applicable in antitrust cases as in all civil actions where appropriate, citing *First National Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (1968).

The more recent decisions of this Court in *Fortner, supra,* and *Norfolk Monument, supra,* do not change the rule of the prior decisions but rather represent applications of the rule in particular situations.

Petitioner cannot claim that any conflicting rule was applied in these proceedings. At most, Petitioner's claim is that Rule 56 was incorrectly applied to the particular facts in this case. Patently it was not, but in any event the claim is no basis for certiorari.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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